IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GLENDA WILLIAMS, Respondent, v. SEATTLE PUBLIC SCHOOLS, Appellant.	)	No. 62742-2-I DIVISION ONE UNPUBLISHED OPINION FILED: February 8, 2010

Appelwick, J. — The District appeals the entry of judgment in favor of Williams, which awarded her damages and attorney fees for retaliation based on Williams's protected activity of reporting sexual harassment. The District contends the trial court erred by denying its proposed jury instruction based on RCW 28A.405.230, which describes the process the District must follow when it transfers an administrator to a subordinate certificated position. The District fully argued its theory of the case without the instruction. We affirm.

FACTS

In August 2003, Glenda Williams, an assistant principal at Ballard High School, informed the Seattle Public School District's (District) high school education director, Sharon Wilkins, that the principal, Method Odoemene, was sexually harassing her. The District concluded that Odoemene had acted

inappropriately and severely reprimanded him. Because Williams told Wilkins she could no longer work with Odoemene, Wilkins arranged to transfer Williams to an assistant principal position at Rainier Beach High School. This required one of the assistant principals at Rainier Beach to be transferred to Ballard to take Williams's spot. The switch occurred one week before the start of the 2003-2004 school year.

At Rainier Beach, Williams experienced hostility from the community. The principal of Rainier Beach, Donna Marshall, questioned Wilkins about the reason for the switch, but Wilkins did not explain the underlying sexual harassment claim. Wilkins did not feel comfortable disclosing to Marshall the disciplinary matters of Odoemene, a fellow principal. Williams testified that Marshall treated her with hostility as well. Marshall testified she would have treated Williams differently had she known of the underlying sexual harassment.

When Williams notified Wilkins of the problems she was having at Rainier Beach, Wilkins placed Williams on administrative leave while she looked for another administrative position. During this period, the media ran numerous stories detailing the sexual harassment complaint. Odoemene was removed from the Ballard principal position. Wilkins offered Williams an administrative position at Middle College, an alternative school, but Williams turned down the position. Williams requested that she be returned to Ballard, believing this option to be better, as she had a relationship with the school and positive reputation that predated the sexual harassment incident. Wilkins refused to return her to Ballard.

In December 2003, the District assigned Williams to serve as an assistant principal at Ingraham High School. There, she joined two other assistant principals, Martin Floe and David Hookfin, and the principal, Steve Wilson. Although there were vacant offices in the administrative wing, Williams was assigned to a space located in the student activity center, on the other side of the building from the administrative offices. Williams found it difficult to do her job from this space, because, among other things, she lacked immediate access to the student database.

Three months later, the office arrangements changed, and Williams moved into Hookfin's office. Principal Wilson had left Ingraham, and Floe became the interim principal. Wesley Felty, the technical support specialist, testified that Hookfin took his furniture with him to his new office, even though the new office was already furnished. Hookfin had brought the furniture with him from his previous school, so he wanted it in his new office as well. Those pieces that Hookfin did not take with him, he attempted to give away to other people in the administrative wing. Felty asked Hookfin what was going on; over the District's objection, Felty testified Hookfin told him that they were going "to give her everything she deserved." Williams completed the 2003-2004 school year at Ingraham.

In the spring of 2004, the District notified Williams that her assignment for the 2004-2005 school year would be as an assistant principal at Roosevelt High School. On May 24, Williams sent the District a notice of claim letter for damages for sexual harassment, hostile work environment, and retaliation.

Williams served as an assistant principal at Roosevelt for three school years, 2004-2007, and the majority of that time Chuck Chinn served as the principal. Williams and Chinn had a good relationship, and she consistently received excellent performance evaluations. In October 2006, Chinn stepped down, and Dick Campbell served as the interim principal.

Williams gave notice of this lawsuit in October 2006, alleging the District had retaliated against her for reporting Odoemene's sexual harassment, in violation of RWC 49.60.210.[1] Around the time Williams gave notice of her lawsuit, Campbell accused Williams of lying on her time sheets. In March 2007, Williams wrote to the new chief academic officer, Carla Santorno, explaining that she felt Campbell was treating her as a troublemaker, a problematic employee. Williams explained that her pending suit against the District was not a secret, and she continued to feel vilified because of it. Santorno did not respond.

On April 30, 2007, the Roosevelt administrators received a report of a fight on the school grounds, in which a gun was allegedly seen. The next day, May 1, Campbell met with the administrators and security personnel to investigate the fight. Later that day, Elizabeth Guillory, another assistant principal, called a meeting and announced the name of a student who had seen the gun. Because this student was one of the students assigned to Williams's roster, Campbell directed Williams to speak with her. During Williams's conversation with the student, the student reported that another student was saying that Guillory and a security guard had offered her $50 for information

[1] Williams filed the complaint in superior court on January 3, 2007.

about the gun. Williams did not immediately mention the bribe allegations to Campbell, as she wanted to get to the bottom of who had the gun.

Williams then wanted to follow up, so she called Venus McLin, the student's mom, to inform her of the alleged bribe, and to request permission to interview the student. A few days before, a change in administrator had occurred at McLin's request. Williams had presided over two of the student's truancy hearings. Campbell had not informed Williams of the administrator change request, despite the policy to include the existing administrator in a change request.

McLin appeared at Roosevelt on May 2, demanding a meeting with administrators. She claimed that during the conversation she had with Williams, Williams told her that Campbell, Guillory, and a security guard were targeting her daughter and other African American students. Bothered that Williams had played the "race card," McLin asked that Campbell take disciplinary action against Williams.

Williams's recollection of the phone call is quite different. Williams informed McLin of the incident in which her daughter had allegedly seen a gun, and the report that her daughter had been offered money to disclose the identity of the student with the gun. McLin asked Williams why she was calling, given the change in administrator.

Ultimately, Campbell sought written statements concerning the situation from all the administrators, except Williams. Campbell then turned in his own account of the statements, including his statement of what McLin had said, to the

new interim director of secondary schools, Phil Brockman.

On May 3, Williams received a letter from Laurie Taylor, the District's interim human resources director, stating that the District was putting her on leave with pay pending investigation of serious allegations of unprofessional conduct related to "a recent student incident."

On May 11, Superintendent Raj Manhas notified Williams via letter of his determination that "the best interests of the District will be served by transferring you to a subordinate non-supervisory certificated position of teacher for the 2007-2008 school year," because of "concerns regarding professional judgment and conduct" pursuant to RCW 28A.405.230. The letter informed Williams she could request a meeting with the board of directors to seek review, under the same statute.

At a meeting on June 20, 2007, with the District's human resource department, Williams and her attorney received an explanation for the superintendant's decision. Later that evening, Williams and her attorney met with the board of directors. Williams asserted that McLin's statement about what Williams told her was inaccurate. She also asserted that the transfer was yet another part of the retaliatory treatment that she had experienced since 2003. School Board President Cheryl Chow informed Williams that the board affirmed the superintendent's decision.

Williams then received her teaching assignment as a substitute at Franklin High School. At the end of the first day at Franklin, she received word that the District would find her another assignment. The District then told her to

go to the library at Nathan Hale High School to see if she could help out. She reported there every day for a few months, but the school did not give her anything to do. Finally, the District called her and told her not to report to Nathan Hale any more. She then remained at home with no assignment. She did not understand her employment status.

After trial, on September 11, 2008, the jury rendered a verdict in Williams's favor. The court then entered judgment on the verdict, awarding her $672,646 against the District and $206,357 in attorney fees.

The District timely appealed.

DISCUSSION

I. Jury Instruction Based on RCW 28A.405.230

Part of the District's theory of the case was that it was entitled to demote Williams, so long as the demotion was not based on an improper reason and that it followed proper procedure in demoting her. The District specifically maintains it would have been able to argue its theory of the case "much more compellingly" with the aid of an instruction based on RCW 28A.405.230.

The District's proposed jury instruction summarized RCW 28A.405.230. This statute provides the process the District must take if it wishes to transfer an administrator to a subordinate certificated position, as the District did to Williams.[2] If a superintendent determines that the best interests of the district would be served by transferring an administrator to a subordinate certificated

[2] RCW 28A.405.230 articulates the due process that the administrator is due, because there is no vested property right to pubic employment. Olson v. Univ., 89 Wn.2d 558, 564, 573 P.2d 1308 (1978). Therefore, there is no constitutional right to due process apart from the due process protections afforded by a specific statute. Id.

position, the superintendent notifies the administrator in writing, stating the reason for the transfer and identifying the new position. Id. The administrator may request to meet informally with the board of directors of the district to request that it reconsider the superintendent's decision. Id. The administrator may refute material facts and make any argument in support of the request for reconsideration. Id. The administrator may also invite legal counsel to participate in this meeting. Id. The board must then notify the administrator in writing of its final decision. Id. The statute specifically precludes appeal of this decision to the courts. Id.

Jury instructions are sufficient if they permit each party to argue its theory of the case, are not misleading, and, when read as a whole, properly inform the trier of fact of the applicable law. Brown v. Spokane County Fire Prot. Dist. No. 1, 100 Wn.2d 188, 194, 688 P.2d 517 (1983). We review a trial court's decision to refuse a requested jury instruction based on the facts of the case for abuse of discretion. City of Tacoma v. Belasco, 114 Wn. App. 211, 214, 56 P.3d 618 (2002). This court reviews de novo a trial court's decision regarding a jury instruction when the trial court's ruling is based on a ruling of law. Cox v. Spangler, 141 Wn.2d 431, 442, 5 P.3d 1265, 22 P.3d 791 (2000). If there is an error of law, the party claiming the error must show prejudice. Hue v. Farmboy Spray Co., 127 Wn.2d 67, 92, 896 P.2d 682 (1995).

The trial court explained why it denied the instruction:

> The instruction that you actually proposed was just a quote from the statute, and I don't think that is appropriate to the case. And frankly, I think it would take the jury a very long time to parse

> through that and even figure out what the heck it means, and since I didn't have something simple proposed to me, I really just need to shortcut this and say I think it's too late at this point for that.
>
> There has been no evidence, and I expect Plaintiff is not going to argue, that somehow the District's policies or procedures or the statutes governing them were violated in how they handled the demotion.

The parties dispute whether reversal is required for failure to give a proposed instruction. The District, citing State v. Williams, 132 Wn.2d 248, 259–60, 937 P.2d 1052 (1997), maintains that failure to permit instructions on a party's theory of the case, where there is evidence supporting the theory, is always reversible error. Williams, citing Joyce v. State, Dep't of Corr., 155 Wn.2d 306, 324–25, 119 P.3d 825 (2005), maintains that the failure to give an instruction is not reversible error if it did not prevent the party from arguing its theory of the case.

The District's formulation of the rule is too broad. In Williams, the trial court had refused to give a duress instruction, despite sufficient evidence supporting this theory, because it was not convinced Williams would face immediate harm. 132 Wn.2d at 258–59. The Supreme Court reversed, because the trial court had taken too literal a view of immediate harm. See id. Absent the instruction on duress, Williams was not able to argue that, as a result of battered women's syndrome, she subjectively believed that the threats from her boyfriend would cause harm, even though he was often away at sea. Id. at 259–60.

In Joyce, the court reversed because the jury instruction contained an erroneous statement of the law that prevented the Department from properly arguing its theory of the case. 155 Wn.2d at 325. To constitute error, the

refusal to give a proposed instruction must preclude argument on the theory of the case. If a party is able to argue its theory of the case without the instruction, no error has occurred. See Joyce, 155 Wn.2d at 324; Williams, 132 Wn.2d at 259–60.

Finally, the parties dispute whether and to what extent the District's proposed instruction affected the District's ability to argue its theory of the case. The District argues it was "unable to apprise the jury of the fact that its decision to transfer Williams was made and reviewed in a manner that was entirely consistent with the statute and thus due process." Yet, the District elicited testimony from Williams on cross-examination that it had followed proper procedure in demoting her:

> Q. . . . thereafter you were given a notice that there would be an investigation involving you?
> A. Yes, I was placed on leave.
> . . .
> Q. And ultimately you were given -- and then eight days later, on May 11, 2007, you were given the notice from the superintendent transferring you to a non supervisory position?
> A. Demoting me, yes.
> Q. And you requested a hearing, and that notice that you had gave you the opportunity to appeal that decision, did it not?
> A. Yes.
> Q. And in fact, you did request an appeal with the school board?
> A. Yes, I did.
> Q. And even before that appeal with the school board, before that proceeding which was . . . June 20th, you were given an opportunity to meet with Lori Taylor, the director of Human Resources?
> A. Yes.
> . . .
> Q. And you were apprised as to what the allegations were involving Ms. McLin, your conversation with Ms. McLin, were you

> not?
>
> A. That was June 20, yes.
>
> . . .
>
> Q. On June 20th you were given the opportunity to present your case in front of the school board, and . . . [your attorney] was there, wasn't she?
>
> A. Yes.

Further, the District explicitly highlighted during closing argument that it was entitled to demote Williams, and that in doing so, it followed the proper procedure:

> What is the truth here? The truth is Ms. Williams is going to say she said that Mrs. McLin had some ulterior motive or pretext because the District wanted to get rid of her [Williams], that they didn't even get her side of the story. And counsel talked about due process. Well, the fact of the matter is it's not required that a superintendent do an investigation before transferring somebody to a non supervisory position. What is required [is that] this person has a right to appeal that decision to the school board.
>
> . . .
>
> . . . on June 7, 2007, she was afforded a meeting with Mr. Campbell and a meeting with Phil Brockman. . . . They had their day in front of the school board. The entire school board had a closed session downtown where [Ms. Williams's attorney] and Ms. Williams were there. . . . Ms. Williams was afforded her day, and the school board didn't see -- didn't deem it necessary or appropriate to overturn the superintendent's decision. She has had every opportunity to present her case.

Contrary to the situation in Williams, 132 Wn.2d at 259–60, where the absence of the duress instruction precluded *any* argument on the defense theory, the absence of the instruction on RCW 28A.405.230 did not preclude the District from arguing that it had a proper motive to transfer Williams to a subordinate certificated position.[3]

[3] We note that a copy of the statute itself was admitted into evidence, attached to a letter the District sent to Odoemene explaining his transfer to a subordinate certificated position. A similar letter from the District, sent to Williams and referencing the same statute, was also admitted into evidence. We also note that the District's proposed instruction was not an accurate summary of the statute itself. It incorrectly stated that the board, rather than the administrator, would be

The District attempts to show prejudice by arguing that Williams improperly discussed due process during closing argument, a topic that the parties had agreed before trial not to discuss.[4] The District points to the following excerpt from Williams's closing argument to show the possibility that the jury could have been confused about whether the District afforded Williams the proper process when it transferred her:

> They [the District] don't talk to her. When does that ever happen? When does that ever happen in our government, in our system, in our culture? . . .
>
> The reason we do that is because that is part of our whole culture and system, that everybody gets to be heard before important decisions are made, and you know what? Glenda Williams never got to be heard, and what does it mean that the School District decided to demote her so quickly, to march her out of the building on the 3rd of March without a question being asked her, and to demote her on the 11th without a question being asked her? Why did they do that? Because, I'm going to suggest, it was because they really wanted to get rid of her since she was suing them. She had just sued them four months before this.

The District, during its own closing argument, responded to any confusion it thought Williams's counsel created in her discussion of the process the District afforded to Williams.

The trial court did not abuse its discretion in denying the jury instruction.

II. Felty's Deposition Testimony

given the opportunity refute the facts on which the transfer was based.

[4] The parties discuss Williams's "pledge" not to discuss due process. This stems from a motion in limine the District filed to preclude Williams from arguing that she was deprived of due process when the District moved her to a subordinate certificated position. The District feared an "[i]nflammatory due process argument" that would confuse the jury, where the issue stemming from the demotion was not the propriety of the procedure but of the motivation behind the decision itself. Williams responded to the motion in limine that "Plaintiff does not argue nor intend to argue that she was denied due process in her transfer to a subordinate position (although she does intend to argue the transfer was a retaliatory action)." The trial court never ruled on the motion in limine. Absent a ruling on the motion in limine, the substance of the parties' arguments on the motion is superfluous.

During Wesley Felty's deposition,[5] he testified that, upon asking David Hookfin what was happening with Williams's office preparation, Hookfin told him that they were going "to give her [Williams] everything she deserved." The District contends that the trial court erred when it admitted this statement. The District contends that the statement did not constitute an exception under ER 803(a)(3). Specifically, the District alleges that ER 803(a)(3) cannot apply to Hookfin's statement, because his behavior cannot be imputed to the District.

This court reviews a trial court's decision to admit or refuse evidence for an abuse of discretion. Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 662–63, 935 P.2d 555 (1997). A manifest abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court. Crescent Harbor Water Co. v. Lyseng, 51 Wn. App. 337, 344, 753 P.2d 555 (1988).

The trial court ruled in the alternative. It first concluded that the statement was not hearsay. It also concluded that it was a statement of intent, admissible as a hearsay exception under ER 803(a)(3). Finally, the court concluded the statement was also "relevant both to rebut the Defense assertion that the problems that Ms. Williams was having at Ingraham were purely of her own making and that no one interfered in any way with her ability to work there."

The District's argument that court erred in applying ER 803(a)(3) to Hookfin's statements, because his behavior could not be imputed to the District, is somewhat misguided. This hearsay exception, by its own terms, does not require the declarant to be a speaking agent of a party. ER 803(a) states that

[5] His deposition became his testimony at trial.

> The following are not excluded by the hearsay rule . . .
>
> . . .
>
> (3) . . . A statement of the declarant's then existing state of mind, emotion . . . (such as intent, plan, motive, design . . .).

The court did not abuse its discretion in admitting the statement under ER 803(a)(3), as it demonstrated Hookfin's intent or plan to deprive Williams of a functional office.

Whether his intent or plan could be imputed to the District was a question of relevancy, not of the statement's admissibility under the hearsay exception. The District also argues that the statement is irrelevant, because Hookfin's intent was irrelevant to whether the District engaged in retaliatory action. However, as Williams argued on appeal and as the court stated in its ruling, Hookfin's state of mind was relevant to refute the District's argument that Williams's problems at Ingraham were of her own making. The relevancy analysis does not require that Hookfin be an agent of the District. The trial court's reasoning was sound and well within its discretion.

While the District's agency argument is not material to whether the statement was relevant or met a hearsay exception, it is material to whether it could be a statement against interest under ER 801(d)(2). Under this rule, a statement is not hearsay if it is offered against a party and is "a statement by a person authorized by the party to make a statement concerning the subject," or "a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party". ER 801(d)(2)(iii), (iv).

For a statement to be admissible under ER 801(d)(2), there must be

evidence that the declarant was authorized to make the statement on behalf of the principal. Barrie v. Hosts of Am., Inc., 94 Wn.2d 640, 644, 618 P.2d 96 (1980). This court may look to the "overall nature of his authority to act for the party" to determine whether his statement falls within the ambit of ER 801(d)(2). Lockwood v. AC & S, Inc., 109 Wn.2d 235, 262, 744 P.2d 605 (1987). Unless the fact of agency can be inferred from the other evidence, independent proof of the agency and its scope must be produced. Passovoy v. Nordstrom, Inc., 52 Wn. App. 166, 171–72, 758 P.2d 524 (1988). As the trial court noted, there was some evidence that Hookfin "personally undertook certain actions and had the authority to undertake certain actions that deprived Ms. Williams of a functional office for some period of time." That evidence was Floe's testimony that Hookfin and Floe shared authority over issues of facilities at Ingraham. The District did not refute this. The court did not abuse its discretion in admitting Hookfin's statement under ER 801(d)(2).

III. Guillory's Testimony

The District contends that the trial court should have admitted Guillory's testimony about what McLin said that Williams said to her, when Williams called McLin about the fight allegedly involving a gun. The District did not seek to admit this statement to prove the truth of the matter asserted. Rather, it wanted to use Guillory's testimony to demonstrate that other Roosevelt administrators knew about the phone call to McLin, as further evidence supporting the District's transfer of Williams to a subordinate position. Further, the District asserts that Guillory's recounting of McLin's statement "played a key role in the decision to

transfer Williams." The trial court denied it on the basis that it was cumulative. ER 403.

Guillory's testimony would have covered what McLin told Guillory and Campbell during their meeting on May 2, which is that Williams called McLin to tell her that Campbell and Guillory were attempting to target African Americans, including McLin's daughter, in their investigation of the fight. The trial court had already admitted the substance of McLin's statement during Campbell's testimony, for the jury to consider the effect on Campbell and on his decision making. Finally, McLin testified about what she said to Guillory and Campbell. Guillory's recounting of McLin's statement would have indeed been cumulative. The trial court did not abuse its discretion in denying Guillory the opportunity to testify about McLin's statement.

IV. Partial Directed Verdict

The District moved for a partial directed verdict on two specific issues: whether Williams's transfer to Rainier Beach was an adverse employment action and whether her subsequent transfer to Ingraham was an adverse employment action. According to the District, no reasonable jury could find those transfers in and of themselves amounted to retaliation, both because Williams had testified that the transfer to Rainier Beach was not retaliatory, and because Wilkins' testimony reflected an appropriate basis for both transfers.

When reviewing a trial court's decision to deny a motion for judgment as a matter of law, the appellate court applies the same standard as the trial court. Sing v. John L. Scott, Inc., 134 Wn.2d 24, 29, 948 P.2d 816 (1997). Judgment

as a matter of law is appropriate when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party. Id. Substantial evidence is that which is sufficient to persuade a fair-minded, rational person of the truth of the declared premise. Brown v. Superior Underwriters, 30 Wn. App. 303, 306, 632 P.2d 887 (1980).

The court must enter judgment on the corresponding "claim, counterclaim, cross claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue." CR 50(a)(1). The District's motion alleged that two of Williams's transfers could not constitute an adverse employment action.[6] The two transfers at issue were evidence in support of an element of Williams's retaliation claim. They were not separate claims. Even if the two transfers at issue were not retaliatory, other evidence of adverse employment action remained (for example, her difficulty with the other Ingraham administrators once she was transferred, or her transfer to a subordinate certificated position). The motion was properly denied, because it would not have extinguished a claim as required under CR 50.

The trial court's reasoning behind its denial of the partial directed verdict reflects additional concerns:

> Plaintiff's theory in this case involves a pattern of events that occurred that Ms. Williams is alleging arose because of her original

[6] To establish a prima facie case of retaliation, the employee must show (1) that the employee engaged in a statutorily protected activity; (2) that an adverse employment action was taken; and (3) that there was a causal link between the employee's activity and the employer's adverse action. Estevez v. Faculty Club of Univ. of Wash., 129 Wn. App. 774, 797, 801, 120 P.3d 579 (2005).

> complaints to the District that she was being sexually harassed by Method Odoemene and being placed in situations that for one reason or another were unworkable for her.
>
> I'm not sure how I can separate out pieces of that in a way that makes sense and instruct the jury in a way that makes sense without commenting on the evidence . . . . The state of the law currently gives the jury a huge amount of discretion because the jury is charged with trying to decide what the motivation of the employer was for the actions that the employer took.

These concerns were well taken.

The court did not err in denying the District's motion for a partial directed verdict.

V. Attorney Fees

Williams alleged a cause of action under chapter 49.60 RCW and was successful. Williams is entitled to fees under RCW 49.60.030(2), which provides for recovery of attorney fees for a person injured by an act in violation of chapter 49.60 RCW.

We affirm the judgment in favor of Williams and award her attorney fees and costs on appeal.

Appelwick, J.

WE CONCUR:

Dwyer, A.C.J. Cox, J.